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In the Supreme Court of the United States

OCTOBER TERM, 1987

CHOTIN TRANSPORTATION, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that comparative negligence standards should be imposed under the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. 401 *et seq.* [hereinafter Rivers and Harbors Act], even though that Act, as the courts of appeals have uniformly held, imposes strict liability on owners of vessels that damage government property.

1. This case arose when one of petitioner's barges collided with a gate in a lock chamber built and operated by the Army Corps of Engineers on the Tennessee River. Petitioner brought suit under the Suits in Admiralty Act, 46 U.S.C. 741 *et seq.*, alleging that the government's negligence caused damage to its barge. The government brought an action against petitioner under the Rivers and Harbors Act, seeking recovery for the damage to its lock.

The district court found that each party was equally negligent. Specifically, it found that petitioner's employees failed to take the necessary precautions to ensure that its flotilla remained secure while in the lock chamber, and that the government's lockmaster failed to direct the

mooring of the vessels in the lock (Pet. App. 37a-45a). With respect to petitioner's claim under the Suits in Admiralty Act, under which comparative negligence principles apply (*United States* v. *Reliable Transfer Co.*, 421 U.S. 397 (1975)), the district court held (Pet. App. 44a-45a) that petitioner was entitled to recover half of the damage to its barge. With respect to the government's claim under the Rivers and Harbors Act, the court held that petitioner was strictly liable under 33 U.S.C. 408 and 412.[1] It accordingly ordered petitioner to pay for all of the damage to the lock (Pet. App. 48a).

A divided panel of the court of appeals reversed (Pet. App. 50a-61a), holding that comparative negligence principles should be applied under both statutes. The Sixth Circuit, however, granted rehearing en banc and vacated the panel's decision (*id.* at 73a-74a). It then affirmed the district court's judgment that petitioner is liable for all the damage to the lock (*id.* at 1a-18a). The Sixth Circuit concluded that Sections 408 and 412 impose a strict liability standard, and found no basis in the statute for application of comparative negligence principles (Pet. App.

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[1] Section 408 provides:

> It shall not be lawful for any person or persons to * * * alter, deface, destroy, move, injure, * * * or in any manner whatever impair the usefulness of any sea wall, bulkhead, jetty, dike, levee, wharf, pier, or other work built by the United States * * * for the preservation and improvement of any of its navigable waters * * *.

Section 412 provides:

> * * * any boat, vessel, scow, raft, or other craft used or employed in violating any of the provisions of sections 407, 408, and 409 of this title shall be liable for the pecuniary penalties specified in section 411 of this title, and in addition thereto for the amount of the damages done by said boat, vessel, scow, raft, or other craft, which latter sum shall be placed to the credit of the appropriation for the improvement of the harbor or waterway in which the damage occurred * * *.

10a-13a). The court also rejected petitioner's contention that this Court's decision in *Reliable Transfer* compels the application of comparative negligence principles (*id.* at 14a-15a). That case did not involve a congressional enactment imposing strict liability, the court explained, but instead involved matters "governed by common law rules of admiralty which the Supreme Court was free to modify" (*id.* at 15a).[2]

While acknowledging that Sections 408 and 412 incorporate a strict liability standard, the dissenting judges (Pet. App. 19a-28a) nevertheless found the application of comparative negligence standards appropriate (*id.* at 19a-26a). They reasoned that common law admiralty tort principles counselled in favor of the imposition of comparative negligence principles (*id.* at 22a-25a).

2. The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is not warranted.

As the court of appeals observed, every circuit addressing the question has concluded that Sections 408 and 412 impose strict liability on vessels that damage river and harbor improvements. *Hines, Inc.* v. *United States*, 551 F.2d 717, 724 (6th Cir. 1977); *United States* v. *Logan & Craig Charter Service, Inc.*, 676 F.2d 1216, 1219-1220 (8th Cir. 1982); *United States* v. *Ohio Valley Co.*, 510 F.2d 1184, 1186 (7th Cir. 1975); *United States* v. *Tug Colette Malloy*, 507 F.2d 1019, 1022-1023 (5th Cir. 1975); see *New England*

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[2] The court of appeals similarly found cases in the admiralty products liability area inapposite (Pet. App. 15a-17a n.5). The court emphasized that those cases involved principles of common law tort liability, not—as here—liability arising from the violation of a strict liability statute. The court also rejected the contention that the Jones Act, 46 U.S.C. 688, somehow mandates that comparative negligence principles apply under the Rivers and Harbors Act (Pet. App. 17a-18a n.5).

Dredging Co. v. *United States,* 144 F. 932, 933 (1st Cir. 1906). Those courts have recognized, as did the court below, that Congress imposed a strict liability standard in order to provide funds for the repair and maintenance of river and harbor improvements (Pet. App. 13a). This statutory strict liability is in essence a form of user fee imposed by Congress to help defray the cost of providing navigational aids and improvements for which the government does not charge directly. Petitioner and other barge operators benefit disproportionately from these improvements, and it was entirely reasonable for Congress to direct that they should pay for all damages to such improvements caused by accidents in which they are involved, rather than sharing this burden with federal taxpayers.[3] Accordingly, no court of appeals has held that comparative negligence principles apply under Sections 408 and 412.[4]

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[3] In 1978, Congress enacted a tax on liquid marine fuels to preserve the navigability of inland and intercoastal waterways. 33 U.S.C. 1801, 1802. That tax, like Sections 408 and 412, helps defray expenses associated with the maintenance of these waterways. The existence of the tax does not, however, as petitioner suggests (Pet. 12), change the express purpose of the Rivers and Harbors Act, which is to place the damages done by the offending vessel "to the credit of the appropriation for the improvement of the harbor or waterway in which the damage occurred" (33 U.S.C. 412).

[4] Both the Fifth and Eighth Circuits, in agreement with the en banc court here, have concluded that the government's contributory negligence is irrelevant under the strict liability inquiry of Sections 408 and 412. In *Tug Colette Malloy*, the court, after finding that both parties were contributorily negligent, declared that "whether the United States was in no way negligent or contributorily negligent is immaterial" (507 F.2d at 1022-1023). Similarly, in *Logan & Craig Charter Service, Inc.*, the court noted evidence establishing the government's probable negligence, but nonetheless found that this factor was not pertinent to the strict liability inquiry under Sections 408 and 412 (676 F.2d at 1219-1220).

There is nothing in the language of Sections 408 and 412 that indicates that a comparative negligence analysis was intended by Congress. To the contrary, Section 408 provides that no one shall "alter, deface, destroy, move, injure, * * * or in any manner whatever impair the usefulness of any" improvement on the navigable waters, and Section 412 provides that any vessel used in violating Section 408 is liable "for the amount of the damages done." Moreover, those provisions were enacted in 1899. It has long been the rule that contributory negligence is not a defense to a strict liability claim, and it has been suggested only recently that comparative negligence principles have any bearing in strict liability cases. 4 F. Harper, F. James & O. Gray, *The Law of Torts* 304-313 (2d ed. 1986). The Congress that enacted Sections 408 and 412 in 1899 clearly did not envision that comparative negligence principles would apply to limit the government's recovery under the strict liability provisions it enacted.

Petitioner's reliance on products liability cases is misplaced (Pet. 11-12). The Sixth Circuit rightly distinguished those cases since they involved common law torts not controlled by specific congressional enactments (Pet. App. 15a-17a n.5).[5] Similarly, contrary to petitioner's assertion (Pet. 9-11), this Court's decision in *Reliable Transfer* has no bearing on this case. There, the Court held that comparative negligence principles, rather than the divided damages rule, would apply in admiralty tort actions. Noting that "[t]he precise origins of the divided damages rule are shrouded in the mists of history" (421 U.S. at 401 (footnote omitted)), the Court declared: " 'Congress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law. No statutory or

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[5] In addition, comparative negligence principles have found much greater acceptance in products liability cases than in other areas of strict liability. 4 F. Harper, F. James & O. Gray, *supra*, at 310-318.

judicial precept precludes a change in the rule of divided damages.' " *Id.* at 409 (citations omitted). Here, in contrast, there is a statute that imposes strict liability on vessels that damage river and harbor improvements.[6]

Nor is there any merit to petitioner's contention (Pet. 7-8) that Congress's enactment of comparative negligence principles in the Jones Act, 46 U.S.C. 688, and the Death on the High Seas Act, 46 U.S.C. 761 *et seq.*,[7] compels adoption of comparative negligence principles under the Rivers and Harbors Act (Pet. App. 18a n.5). To the contrary, the fact that Congress has mandated the use of comparative negligence principles under other Acts, but has not adopted it in Sections 408 and 412, supports the conclusion that comparative negligence rules do not apply in cases brought under those Sections.

Finally, petitioner's invocation (Pet. 8-9) of *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375 (1970), is similarly misplaced. In *Moragne*, the Court relied on subsequent

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[6] Petitioner erroneously cites *Wyandotte Transportation Co.* v. *United States*, 389 U.S. 191 (1967), for the proposition that the Rivers and Harbors Act incorporates principles of comparative fault (Pet. 4). In concluding that the Act permits the government to remove wrecks from the navigable waters and then seek reimbursement from the vessel owner, the Court was addressing 33 U.S.C. (1964 ed.) 409, which at the time imposed liability on persons who "voluntarily or carelessly sink" vessels (see 389 U.S. at 197). Congress subsequently deleted "voluntarily or carelessly" from Section 409, so that it now imposes liability on persons who "sink" vessels. Pub. L. No. 99-662, § 939(a), 100 Stat. 4199.

[7] The Jones Act rule of recovery is set forth in 45 U.S.C. 53, which provides that "the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee." Similarly, the Death on the High Seas Act provides that "the fact that the decedent has been guilty of contributory negligence shall not bar recovery, but the court shall take into consideration the degree of negligence attributable to the decedent and reduce the recovery accordingly" (46 U.S.C. 766).

statutory changes as one reason for overruling a federal common law maritime rule precluding actions for wrongful death. Petitioner would have this Court rely on subsequent statutes to change the settled meaning of an Act of Congress. This amending function, we suggest, is one that should be performed by the legislative rather than the judicial branch.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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